

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL HARRIS)	
Claimant)	
)	
VS.)	
)	
WAL-MART)	
Respondent)	Docket No. 1,005,224
)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request Appeals Board (Board) review of the September 19, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

This matter came before the ALJ on respondent's Motion to Terminate the benefits previously awarded by Judge Avery in his November 26, 2002 Order for Medical Treatment. That Order provided: "Medical treatment is granted and ordered paid on claimant's behalf by respondent and insurance carrier with Dr. Lepse." ¹ Respondent contends that claimant has recovered from the temporary work related aggravation of his pre-existing knee condition. Therefore, his present need for medical treatment is not due to the accidental injury that arose out of and in the course of his employment with respondent on December 11, 2001. Accordingly, respondent contends that the Order for Medical Treatment at respondent's expense should be terminated.

¹ Order for Medical Treatment (Nov. 26, 2002).

Claimant disputes that his work related aggravation has resolved. Instead, claimant argues that the December 11, 2001 accident where he fell and struck his left knee on the floor at work aggravated his pre-existing degenerative arthritis and accelerated his need for knee replacement surgery. Claimant argues that respondent is therefore obligated to continue paying for his medical treatment including surgery. Claimant also argues that the Board does not have jurisdiction at the preliminary hearing stage of the proceeding to review the issue of whether claimant's present need for medical treatment is related to the December 11, 2001, accident.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record compiled to date, the Board finds that the ALJ's Order should be reversed and additional medical benefits denied. The Board has jurisdiction at the preliminary hearing stage of a claim to review the issue of whether claimant's present need for medical treatment is related to an injury that is compensable under the Workers Compensation Act. And claimant has failed to prove his current need for medical treatment is directly attributable to the accident at work.

This is an appeal from a preliminary hearing order. Accordingly, the Board acknowledges that its jurisdiction over preliminary hearing issues is limited. The Board, however, does have jurisdiction to review those issues listed in K.S.A. 44-534a, which include whether the alleged injury arose out of and in the course of employment. A worker is only entitled to medical treatment under the Workers Compensation Act for injuries that are compensable under the Act. Consequently, in the context of this claim, the issue of whether the present need for medical treatment is related to a compensable injury is similar to the issue of whether the injury (for which claimant is seeking medical treatment) arose out of and in the course of employment.

Dr. Peter S. Lapse is recommending joint replacement surgery. Claimant is a 50 year old with a history of left knee problems. Claimant's history of left knee injuries includes a fall from a cooling tower in 1976 that resulted in surgery for damaged ligaments and cartilage. Post operatively he was placed in a cast and then a brace for several months and missed four to six months of work.

Claimant did not testify at the September 18, 2003 preliminary hearing. However, at the November 26, 2002 preliminary hearing claimant testified that after his recovery from the surgery following his 1976 knee surgery he was essentially pain free and able to work without restriction or limitation. Furthermore, after recovering from the 1976 injury, he had not required any additional medical treatment for his knee before the December 11, 2001 accident. Since that accident, however, he has had problems with pain and swelling in the knee. Claimant acknowledged receiving medical treatment in 1997 for a back injury and reporting pain and numbness in his left leg and knee at that time. But claimant said those symptoms were related to his back and not his knee.

Claimant missed two or three days of work following his December 2001 accident. He returned to work at Wal-Mart until April 2002 when he quit due to his not liking a change in job duties. Claimant does not relate quitting his job at Wal-Mart to his knee injury. He then went to work at the Caterpillar plant in Wamego, Kansas, sometime in April 2002 and was working there at the time of his November 26, 2002 preliminary hearing testimony. Claimant said he was a site supervisor at the Caterpillar plant. His job requires him to be on his feet standing and walking about 75-80 percent of the time. The other 20-25 percent of his time is spent doing paperwork. Claimant generally works eight-hours a day, five days a week with some overtime. He said his job involves very little physical activity although he does do some lifting such as lifting a gallon of floor stripper or cleaner from the floor. Claimant acknowledged that his job duties include stripping floors. Although he has had incidents where his knee has swollen up since going to work at Caterpillar, claimant does not relate the swelling to any accident or activity at work. Claimant suffered a work related back injury at Caterpillar but denies any injuries to his knee at Caterpillar. Claimant denies suffering any injuries to his knee since his slip and fall at Wal-Mart in December of 2001.

Claimant was treated by orthopedic surgeon Kenneth A. Jansson, M.D. Dr. Jansson last examined claimant on October 2, 2002. He opined that claimant:

[H]ad severe osteoarthritis secondary to chronic knee problems and prior surgery, and I feel that the slipping in the rest room was a minor, if any, contribution to his medical condition at thi[s] time. I feel that he suffered probably just a simple contusion; and the severe arthritis, which is his main medical problem, is clearly pre-existing. I think Mr. Harris is at maximum medical improvement for the aggravation he suffered from the fall in the rest room.²

The most recent record from orthopedic surgeon Peter S. Lepse, M.D., is dated May 6, 2003. At that time Dr. Lepse reviewed claimant's history which he described as follows:

He injured the left knee in a fall some 20 years ago and underwent surgery on the left knee. He recovered well and functioned well until a job-related injury while working at Wal-Mart in December of 2001. The present [w]ork [c]omp claim stems from this work-related injury at Wal-Mart.³

Dr. Lepse's diagnosis was "[p]ost-traumatic arthritis, left knee."⁴ His treatment recommendation included total knee replacement surgery. Dr. Lepse also recommended

² M.H. Trans., Resp. Ex. A.

³ M.H. Trans., Cl. Ex. 1.

⁴ M.H. Trans., Cl. Ex. 1.

claimant work only in the sedentary category and that he completely avoid climbing, squatting, crawling and kneeling.

Claimant was examined by orthopedic surgeon Fred A. Rice, Jr., M.D., on August 13, 2003. Dr. Rice concluded that claimant:

[H]as a moderately severe traumatic arthrosis primarily of the lateral compartment of the left knee, which I believe is totally related to his initial injury in 1976. The injury he describes that occurred in December of 2001 with direct injury to the anterior aspect of his knee in a direct fall could not possibly account for more than a temporary aggravation of his pre-existing traumatic arthrosis.⁵

Although Dr. Lepse seems to relate claimant's present condition and need for surgery, at least in part, to his work-related accident at Wal-Mart, he does not explain how that accident caused or contributed to his need for the total knee replacement surgery. Conversely, Drs. Jansson and Rice specifically opine that the December 2001 injury was temporary and has no causal relationship to his degenerative arthritis condition and need for knee replacement surgery.

The Board finds that the greater weight of the expert medical testimony supports respondent's Motion to Terminate medical treatment benefits.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the September 19, 2003 preliminary hearing Order of Administrative Law Judge Brad E. Avery denying respondent's Motion to Terminate is reversed and medical benefits are terminated.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

⁵ M.H. Trans., Resp. Ex. B at 2.

c: Jeff K. Cooper, Attorney for Claimant
 James B. Biggs, Attorney for Respondent and American Home Assurance Co.
 Brad E. Avery, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director